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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., a corporation, and THE EXCHANGE ORANGE PRODUCTS COMPANY, a corporation,
*Petitioners,*

*vs.*

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,
*Respondents.*

## BRIEF FOR PETITIONERS.

### Opinion Below.

The opinion of the Court of Appeals is reported in 284 F. 2d 1, and is printed at pages 3950-4005 of the Record. An order modifying that opinion in certain particulars is not reported, but is printed at pages 4006-4007 of the Record. There was no opinion in the District Court.

### Jurisdiction.

1. Jurisdiction of this Court is invoked on the ground that review is sought of the judgment of a United States Court of Appeals reviewing a judgment of a United States District Court in an action arising under the antitrust laws of the United States. The statutory provision believed to confer that jurisdiction is 28 U.S.C.A., sec. 1254(1).

2. The judgment of the Court of Appeals was entered on September 30, 1960. [R. 3950, 4005-4006.] A timely petition for rehearing was filed by these petitioners, which was denied on May 5, 1961. [R. 4008.] The petition for certiorari was filed on July 20, 1961.

## Statutes Involved.

The statutory provisions involved are sections 1 and 2 of the Sherman Act [*Act of July 2, 1890*, 26 Stat. 209; 15 U.S.C.A., secs. 1, 2]; section 6 of the Clayton Act [*Act of Oct. 15, 1914*, 38 Stat. 731; 15 U.S.C.A., sec. 17]; and section 1 of the Capper-Volstead Act [*Act of Feb. 18, 1922*, 42 Stat. 388; 7 U.S.C.A., sec. 291]. They are set forth in the appendix to this brief.

## Question Presented.

Where a group of citrus fruit growers form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act [7 U.S.C.A., sec. 291]—is an unlawful conspiracy under sections 1 and 2 of the Sherman Act, established upon proof only that these growers, through the agency of these three cooperatives, agreed among themselves with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?

## Statement of the Case.

### 1. Introductory Description of the Case and the Parties.

The respondent Winckler & Smith Citrus Products Co. on February 1, 1952 commenced an action in the District Court for the Southern District of California to recover treble damages from the defendants for an alleged conspiracy to restrain and monopolize interstate trade in citrus fruit and canned fruit juices.[1] [R. 3, 13-14, 23.] Less than two months later Winckler commenced a reorganization proceeding under Chapter X of the Bankruptcy Act. The other respondent, Ronald Walker, was the trustee of Winckler's estate in that proceeding and was permitted to intervene in the action. [R. 24-25.]

Originally, the defendants in the action were Growers, EOP, ELP and TreeSweet. [R. 3.] The complaint, however, was twice amended—the last time shortly before the close of the trial to "conform to evidence." [R. 72-73, 250-251.] By that time ELP and TreeSweet had been dropped as defendants and the cause dismissed as to them—with prejudice as to ELP and without prejudice as to TreeSweet. [R. 67-72, 100-101, 144.] TreeSweet and ELP, however, were

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[1] It will be convenient to refer to Winckler & Smith Citrus Products Co. as *"Winckler."* And also, to refer to the Sunkist agricultural cooperative organization of fruit growers collectively as *"Sunkist"*; to their marketing agency, Sunkist Growers, Inc., as *"Growers"*; to their orange-processing agency, The Exchange Orange Products Company, as *"EOP"*; and to their lemon-processing agency, Exchange Lemon Products Company, as *"ELP."*

TreeSweet Products Co., and E. A. Silzle Corporation, alleged to have been co-conspirators [see, p. 4, *infra*] will be referred to as *"TreeSweet"* and *"Silzle"* respectively.

retained as alleged co-conspirators; and in the meantime Silzle had been added to that category. [R. 78, 255-256.]

These amendments narrowed the general nature of the action to one to recover treble damages for an alleged conspiracy, among Growers, EOP, ELP, Tree-Sweet and Silzle, (1) to restrain interstate trade in "canned citrus fruit juice produced and processed in the State of California and marketed throughout the United States . . ." [R. 265]; and (2) to monopolize that part of interstate trade "in natural and frozen concentrate fruit juices which is represented by the production of natural and frozen concentrate fruit juices processed in California . . . particulary single-strength Valencia orange juice . . ." [R. 271.]

After an extended trial, the cause was submitted to a jury under a charge which permitted a verdict against the defendants even if the conspiracy found to have been engaged in consisted only of concert of action within the Sunkist cooperative organization in processing and marketing the fruit of its grower-members. Conspiracy, combination or contract with someone outside of the Sunkist cooperative system was not made an essential element of a finding that the antitrust laws had been violated. [See pp. 17-19, *infra.*] The jury returned a general verdict against Growers and EOP in the sum of $500,000.00. [R. 295.] Judgment upon that verdict was entered in the sum of $1,692,500.[2] [R. 336-339.] On appeal from the judgment by Grow-

[2]That sum includes the trebled amount of $1,500,000, plus $195,000.00 attorney's fee and less $2500.00 paid by TreeSweet as consideration for its dismissal from the action. [R. 68-69, 338.]

ers and EOP, the Court of Appeals affirmed on the issue of liability and reversed on the issue of the amount of damages. [R. 4005-4006.] A petition for certiorari by Growers and EOP was granted, limited to the one question already stated. [R. 4009.]

**2. The Sunkist Cooperative Organization.**

About 12,000 individual growers of citrus fruits in the states of California and Arizona, whose average productive holding is about 16 acres each, have joined together for the purpose of "collectively processing, preparing for market, handling and marketing" their fruit and its by-products. [R. 538-540, 549-563, 2693-2710, 2723-2727, 3043-3045.] That organization over the years has evolved into and has taken the form of three nonprofit agricultural cooperative corporations (Growers, EOP and ELP) which are the agencies to whom have been delegated the processing and marketing functions necessary to get the grower-members' fruit and fruit products to market.[3] Each of these corporate entities handles only the fruit of Sunkist grower-members. [R. 538-540, 669, 695, 2725-2726, 2959.] Each of them complies in all respects with the organizational and other conditions prescribed by the Capper-Volstead Act for immunity from the sanctions of the antitrust

[3]Originally, there was only one corporate entity, then called California Fruit Growers Exchange and now called Sunkist Growers, Inc. [R. 545.] The organization of the processing agencies, EOP and ELP, and their inclusion in the Sunkist organization came about as the result of need for the discovery and perfection of knowledge and techniques necessary to salvage and utilize, for the production of such by-products as could be developed, that fruit which was not sold as fresh fruit. The history of that development, the evolution of cooperative citrus marketing generally in California and the role in it played by Sunkist is interestingly told in the record; but it need not be set out at length in this brief. [See, R. 555-557, 2697-2708.]

laws in respect of such collective processing, handling and marketing of agricultural products. Indeed, that they do so comply was conceded below by all concerned. [R. 442, 444-445, 448-449, 3699-3701.]

This agricultural cooperative organization was referred to below as the "Sunkist system." That term was used to mean not merely the one corporate entity called "Sunkist Growers, Inc." but the entire organization—from the grower up through his intermediate associations [see pp. 6-8, *infra*] to the three corporate entities (Growers, EOP, and ELP) into which the growers are organized—that exists for the purpose of processing and marketing the products of its grower-members. It included also the functions of processing and marketing carried on by the various components of that organization. [R. 2693-2696.] Sunkist is an organization, everyone agreed below, substantially the same as other marketing organizations organized under the Capper-Volstead Act. [R. 2695.]

At the base of the Sunkist system are the individual growers. It is their fruit, and only their fruit, that is handled by Sunkist. It is they who control and manage all components of the Sunkist cooperative organization. The individual growers have organized into local associations. The local associations, in turn, organized into twenty-two district exchanges, each of which is governed by a board composed of grower-member representatives of the local associations included in it. Each district exchange selects one grower-member to be its representative on the governing board of Sunkist Growers, Inc. All representatives serve without compensation. [R. 538-540, 549-563, 2696-2701, 2723-2725, 3043-3045.]

Growers is a California nonprofit agricultural cooperative marketing corporation organized in 1905. It is a membership corporation and so has no capital stock. Its immediate members are the twenty-two district exchanges already mentioned. All of its revenues, less cost of operation and minor reserves for bad debts and other such contingencies, are distributed to the grower-members. [R. 538-540, 549-563, 2693, 2710, 2723-2725, 3043-3045.] Growers is the marketing agency for all of the Sunkist grower-members. [See, pp. 8-10, *infra*.]

EOP is a California nonprofit stock corporation, organized in 1916. Its stock is wholly owned by Growers. Its sole function in the Sunkist system is to process into juice and other by-products those oranges and grapefruit, grown by the Sunkist grower-members, which are not sold as fresh fruit.[4] [R. 539, 666-673, 690-691, 2956, 2959, 3043-3045.]

ELP is a nonprofit California corporation, of the stock type, organized in 1915. Its stock is wholly owned by Sunkist grower-members and their local associations. Its sole function in the Sunkist system is to process into juice and by-products those lemons grown by the Sunkist grower-members which are not sold as fresh fruit. [R. 538-540, 552-553, 555-563, 2725-2726. Pl. Ex. 30; R. 894, E453.[5]]

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[4]Fruit not sold as fresh fruit is referred to as "by-product" fruit. It is, in other words, that fruit which is used or sold for processing into another product, *e.g.*, juice or a pharmaceutical, as distinguished from the fruit that is disposed of to be used directly as human food.

[5]The "Exhibit Volume" is not paged consecutively with the remainder of the record. A page reference in this brief preceded by an "E" refers to the Exhibit Volume.

The basic relationship among these components of the Sunkist system is defined by an agreement entered into in 1940, to which Growers and its various district exchanges and local associations were parties [Pl. Ex. 1 (par. 2); R. 557, E2-E3]; and which is terminable by any association or exchange, as to it, by notice prior to October 31 of any year. [Pl. Ex. 1 (par. 29); R. 557, E1, E21.] The gist of that agreement is that all citrus fruit produced by the grower-members is to be marketed by or through the local associations and district exchanges who, in turn, are to market it through Growers. For that purpose Growers is the agent of the local associations and district exchanges. Each local association reserves the right to designate the markets to which the fruit of its grower-members is to be shipped and the price it is willing to receive. [R. 558-559. Pl. Ex. 1 (pars. 6, 7, 9, 14, 17); R. 557, E1, E8-E9, E13, E14.]

Growers' primary concern is the marketing of Sunkist fruit as fresh fruit; and most of it is sold in that form.* [R. 540-541.] The fruit not so sold is processed, or sold to others for processing, into by-products such as juices, concentrates, oil, pharmaceuticals, pectin and cattle feed. [R. 551, 2957-2959.] The 1940 agreement [Pl. Ex. 1 (par. 1); R. 557, E1, E6] provides that in the case of fruit to be sold other than as fresh fruit, Growers may establish pools for its handling and marketing. To establish such a pool there must be a concurrence of a majority of the members of Growers' board of directors, including directors representing 75%

*When the phrase "Sunkist fruit" or "Sunkist by-product fruit" is used in this brief the reference is to fruit produced by the grower-members of Sunkist. The Sunkist cooperative organization does not handle any other fruit. [R. 669, 2726.]

by volume of the shipments involved. [Pl. Ex. 1 (par. 14); R. 557, E1, E12.]

Such a pool was in existence in 1950-51 for oranges not utilized as fresh fruit.[7] [R. 574-576. Pl. Ex. 3A; R. 575, E31.] Its purpose was to provide for the processing of the by-product fruit of Sunkist grower-members by EOP and ELP into juice and other forms of by-products; for the marketing of those by-products by Growers in behalf of the grower-members; and for the equitable allocation of the proceeds to the grower-members whose fruit was so utilized. [R. 568-573.] In essence, the pooling plan provided for classification of the fruit, in accordance with specified standards, into "juice" and "product" grades; and for the method of crediting to each grower-member whose fruit was included in the pool his proportionate share of the proceeds resulting from the sale of it and its by-products. [Pl. Ex. 3A; R. 575, E31.]

Under date of April 6, 1949 Growers, EOP and ELP provided by agreement for the handling of Sunkist by-product fruit. [R. 559-563; Pl. Ex. 2; R. 557, E28.] That agreement made specific, in respect of by-product fruit, Growers' underlying obligation to market all Sunkist fruit. [See, Pl. Ex. 1 (par. 6); R. 557, E8.] It recited that on September 10, 1940, Growers' board of directors had designated EOP and ELP as agencies for the utilization of Sunkist by-product oranges and lemons; and that, in recognition of its obligation to market all the fruit of Sunkist grower-members Growers had established a "Products Department" for distribution and sale of Sunkist fruit in processed

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[7] A similar plan was in effect in earlier years, but the record does not show during what period. [R. 574-575.]

or by-product form. The management of that department was delegated to a joint executive committee of sixteen members appointed, eight each, by EOP and ELP from their repective boards of directors.[8] [R. 562, 565, 878-881.]

### 3. Respondents' Theory of Liability and the Evidence Relating to It.

It was generally respondents' theory below that in 1951 petitioners, in pursuance of the conspiracy alleged, performed certain acts—referred to throughout the trial as the "six acts"—that assertedly caused the respondents' injury. These acts, in short statement, were: (a) Processing by EOP of some lemons for ELP; (b) processing by ELP of some oranges for EOP; (c) execution of a processing and juice-purchase contract with TreeSweet; (d) execution of a similar contract with Silzle; (e) refusal by Sunkist to sell by-product oranges to Winckler at less than $40 per ton or to enter into a processing-juice purchase contract with it; (f) setting of a price for Sunkist by-product oranges which did not permit selling single strength orange juice at competitive prices. [R. 254-256, 265-270.] The evidence relating to these acts, in summary form, follows:

(a) *Intra-cooperative processing.* In 1951, under oral agreements between them, EOP processed about 164,000 tons of by-product oranges produced by Sunkist grower-members; and ELP processed an additional 31,200 tons for EOP. In the same year EOP processed some lemons for ELP. [R. 541, 543-544; Pl. Ex. 12;

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[8] As we have seen [p. 6, *supra*] the governing boards of all components of the Sunkist system are composed of grower-members.

R. 679, E292. Pl. Ex. 13; R. 680, E292.] Such "reciprocal" processing is a temporary measure, done when one of the Sunkist processing agencies needs a particular product for which at the moment it does not, but the other does, have facilities. [R. 669, 681.] It is done at cost. [R. 681-683.]

(b) *TreeSweet contract.* As had been the case for several years before, TreeSweet and EOP entered into a processing-juice purchase contract in 1951. [R. 753-755, 757-758, 908-913, 944-945, 2979-2986, 2988-2990, 3051-3057. Pl. Ex. 20; R. 738, E332-E341.] By that contract EOP agreed to supply TreeSweet, for processing into single strength canned orange juice, with such quantities of oranges as the former might determine, for which processing TreeSweet would be paid its actual cost. [Pl. Ex. 20 (paras. 2, 3); R. 738, E335.] TreeSweet agreed to purchase the resulting juice at Growers' prices in effect at time of purchase, less discount and certain specified trade allowances. The price was to be paid when the juice was sold, but all of it was to be taken and paid for, in any event, by June 1, 1952. [Pl. Ex. 20 (pars. 9, 10); R. 738, E336, E337.] The juice remained EOP's property until purchased by TreeSweet. [Pl. Ex. 20 (par. 2); R. 738, E335.]

This type of contract was a means by which Sunkist fruit that might otherwise remain unsold was enabled to be disposed of. Packers of canned orange juice were reluctant to pack for inventory because, when they did so, they had to expend the cost of processing at the time of processing, and thus take the risk of a later decline in price for the canned product in a market dominated [R. 650-653, 1055, 1602-1603, 2186-2187, 2194-2198, 2203-2212, 2281, 2721-2723, 2961-2965] by

Florida production. Consequently, they tended to buy their requirements of by-product oranges on a day-to-day basis. The processing-juice purchase type of contract overcame the reluctance to pack for inventory. This it did by reimbursing the packer for his processing cost and assuring him that the price he would have to pay for the resulting juice would be the regular Sunkist price current at the time he elected or was required to buy it. The packer was obligated to buy all of the juice packed under the contract. In these ways, therefore, the processing-juice purchase type of contract enabled Growers better to perform its duty to market the maximum quantity possible of the fruit produced by Sunkist grower-members. [R. 756-760, 772-773, 2980-2985, 3051-3057.]

(c) *Silzle contract.* On September 10, 1951, EOP and Silzle entered into a written processing-juice purchase contract, which formalized an oral agreement made in the spring of that year and under which they had been operating. [R. 772-789, 801-807, 950-956, 965-976, 2987-2988. Pl. Ex. 25; R. 788-789, E356-E368.] Under it EOP agreed, as it was able, to supply and Silzle agreed to take and pay for a specified quantity of oranges for processing into single strength canned juice. The resulting juice was to be paid for upon shipment, at prices specified in the contract. These prices were based upon Sunkist's regular price less an amount based on Silzle's processing costs. [R. 2987-2988.] If the juice purchased by Silzle was not shipped immediately upon production it was to be stored in a Lawrence warehouse and released upon Silzle and EOP's joint signature. EOP's joinder in such release was conditioned on payment of the contract price by Silzle. All costs of the operation, including processing and storage, were to be borne by Silzle.

(d) *Dealings with Winckler.* Until 1948 Winckler customarily bought a substantial part of its by-product orange requirements from Sunkist. In that year, however, it transferred its patronage to other suppliers, mainly Morgan Ward.[9] From then on Winckler bought virtually no oranges from Sunkist.[10] [R. 646, 655-659, 661-662, 1005-1006, 1012-1016, 1431-1450, 1587-1589.]

In 1951 Ward had from 12% to 15% of the total supply of by-product oranges available in the California-Arizona area. According to him, he had "a lot of fruit" for which there was no "home" except with cer-

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[9]Actually, the supplier was Independent Growers & Shippers Association, for whom Morgan Ward was the selling agent. The latter's name was frequently used during the trial as a convenient means of reference to the Association, and we continue to do so in this brief.

[10]The transfer of Winckler's patronage was brought about by Sunkist's dissatisfaction with Winckler's credit standing and the slowness of its payments. As a consequence, in 1948 sales to it were put on a cash basis. [R. 648-649, 656-662, 665.] Shortly after that was done, Winckler was informed by Ward that the latter had fruit and was happy to sell to Winckler on the usual terms. So, from that time on Winckler dealt mainly with Ward. [R. 1012, 1014.] Ensuing upon that transfer of patronage, Winckler got its Valencia oranges from the following suppliers in the proportions specified [Def. Ex. BP; R. 2407-2408, E541. Def. Ex. BQ; R. 2410-2411, E542. R. 1014-1016, 1436-1442.]

| | From Ward | From Sunkist | From Others |
|---|---|---|---|
| 1949 | 73.28% | 17.47% | 9.25% |
| 1950 | 91.31% | 1.54% | 7.15% |
| 1951 | 86.66% | 0.43% | 12.91% |

In 1948 Winckler bought 2161 tons of oranges from Sunkist. The record does not show what percentage of its total purchases in that year this amount was; but in 1949 when it bought 17.47% of its oranges from Sunkist it got 2225 tons from that source. [R. 1966-1977.]

In 1947 Winckler and EOP had entered into two processing contracts. [R. 1611-1615.] The quality of the juice produced by Winckler was so bad that much of it was poured down the sewer, and other quantities had to be re-processed, by EOP [R. 3031-3034, 3062-3063, 1129-1130, 1610-1612.]

tain firms, two of whom were Winckler and another called Case-Swayne. [R. 1581, 1600.] In that year he entered into a processing contract with Case-Swayne under which he supplied it with oranges to be processed into single strength juice. He also entered into a processing contract with Winckler under which oranges were supplied for processing into frozen concentrate. Winckler asked, indeed demanded, that Ward supply it oranges for processing into single strength juice. [See, *e.g.*, Def. Ex. AX; R. 1573, E536.] Ward refused to do so. [R. 1598-1601.] His reason for the refusal was that he had given Case-Swayne a single-strength processing contract and he did not want his oranges "out in the market competing in canned juice form, competing against each other." [R. 1439-1440, 1601.] Sunkist had nothing at all to do with this refusal. It was not even shown to have had knowledge of it. [R. 1576-1578, 1596-1602.]

Ward's final refusal came some time after August 17, 1951.[11] In the meantime Winckler had inquired of Sunkist if there was any change in the latter's price for by-product fruit, and was told it was still $40 per ton. Winckler complained, in effect, that at this price single strength juice could not be profitably processed to sell at the then prevailing juice prices.[12] Winckler

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[11]On that date Winckler wrote to Ward complaining of the "Monopolistic situation" he was creating and requesting that the matter be put before the Association's By-Products Fruit Committee. [Def. Ex. AX; R. 1573, E536.] Ward did so; the Committee left decision up to him; and he decided not to give Winckler a contract. [R. 1598.]

[12]In 1951 most by-product oranges—for example, 75.6% of the California-Arizona supply—were used for processing into frozen concentrate juice rather than for single strength. Only 2.4% was used for the latter type of juice. This was so because

evidenced no desire to purchase; and Sunkist was not disposed to lower its price. [R. 608, 615-616, 647, 1058-1066.] Later, Winckler requested an "arrangement" for fruit similar to the one he assumed other processors, such as TreeSweet and Silzle, had. He was told, however, that by then EOP had or had arranged for sufficient facilities to handle the expected crop and that no more processors were needed. [R. 857-861, 1061-1067, 1069-1070, 2998-2999, 3002-3003, 3101-3102.]

(e) *Prices.* Growers as the marketing agency for all Sunkist fruit, of course, sets the price at which Sunkist by-product fruit and the products processed therefrom by Sunkist will be sold.[13] The price in each instance is determined by the manager of the division or department whose product is involved. Consultations with respect to prices take place among Sunkist's exec-

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of the much larger demand for the frozen product and because a greater return could be realized for the grower. At a price of $40 per ton for by-product oranges processors of the frozen concentrate juice could and did operate profitably. [R. 654, 890-891, 1525-1530, 1594-1595, 2970-2972.] The plain fact is that the development of the frozen product only a few years before and its almost universal public acceptance had made canned single strength juice an obsolescent if not obsolete commodity.

[13]Price-fixing by agreement with *outsiders* was never an issue in this case. The only allegation on the subject of prices is that Growers and EOP agreed to establish and maintain a price for their by-product oranges that made it "impossible for independent processors such as plaintiff, to purchase or acquire by-product oranges from defendant E.O.P. or any other source, at a price . . . that would enable plaintiff . . . to produce and sell canned natural and frozen concentrate juice at a price that would be competitive to the prices charged by defendants and favored processors TreeSweet and Silzle." [R. 265-267.] Whatever may be the scope of this allegation, "price-fixing" in the ordinary antitrust sense [See R. 412-413], or as a cause of damage, was repeatedly disclaimed by respondents throughout the trial. [R. 412-413, 2817-2818, 2880, 2926, 2929, 2936-2937, 3168-3169, 3256, 3378.]

utives and operating personnel, and inquiries as to market conditions may be made on the outside; but final decision in all cases is for the appropriate Growers' department or division manager. [R. 566-568, 576-579, 591-594, 616-619, 625-631, 683-685, 877-878, 882.]

In 1951, Sunkist's opening price was $40 per ton for by-product oranges of 120 pounds of soluble solids. This price was set by the manager of the division of Growers having charge of sales of by-product fruit in the Los Angeles area. It did not change during the 1951 season. [R. 623, 625-631, 649-656. See note 12, p. 14, *supra.*]

Sunkist's juice prices in 1951 were determined in similar fashion by the manager of the Products Department of Growers. They varied from time to time during the season and were sometimes but not usually the same as competitors' prices. [R. 567-568, 592-594. 683-685, 815-819, 850-851, 877-878, 882, 889, 979, 984-986, 1454-1457, 1480-1482, 2274-2275, 2280-2281, 3057.] Analysis of Sunkist's and TreeSweet's price lists [Pl. Ex. 27; R. 816, E369-E442. Pl. Ex. 28; R. 816, E443-E452. Pl. Ex. 36; R. 916, E461-E466] shows that during all of that season, except for three or four weeks when they were the same, TreeSweet's juice prices were substantially lower than Sunkist's. Winckler's prices varied from locality to locality and from time to time. Usually, they were different from Sunkist's. [R. 850-851, 889, 1454-1457, 1480-1482.] Silzle's prices were in the same general range as Sunkist's, but were not identical. [R. 979, 984-986, 2951-2954.]

**4. How the Question Arose and Was Decided.**

The jury were instructed generally that no formal agreement is necessary to constitute a conspiracy or combination, but one may be inferred from a course of dealing [R. 3686]; that it is sufficient to show a conspiracy or combination if there is concert of action, all of the parties working together understandingly, with a single design and for the accomplishment of a common unlawful purpose [R. 3687]; and that it is unlawful to conspire or combine to restrain or monopolize interstate trade in single-strength orange juice or other citrus juices. [R. 3697-3699.] The jury were also told that if the petitioners (Growers and EOP) and the alleged co-conspirators (ELP, TreeSweet and Silzle) conspired to restrain or monopolize interstate trade in citrus fruit juices, especially single strength orange juice, and in pursuance of that conspiracy did any one of the six acts with resultant injury to Winckler, liability under the antitrust laws was made out against the petitioners. [R. 3690, 3692-3694, 3711-3713.]

The generality of the charge just summarized was made specific in a way that permitted the jury, notwithstanding Capper-Volstead, to find liability based upon conspiracy even if the only element of agreement upon a course of action was entirely and only between or among the component parts of the Sunkist cooperative organization. Accordingly, and to that effect the jury were given these instructions:

(a) Only one combination or conspiracy was charged in the case. [R. 3697.]

(b) Growers and EOP could combine or conspire together to violate sections 1 and 2 of the Sherman Act. [R. 3688-3689.]

(c) Notwithstanding that the charge was that the defendants (Growers and EOP) and the co-conspirators (ELP, TreeSweet and Silzle) had conspired, the jury could find that all of them, none of them, or "some number less than the total" conspired. [R. 3730.]

(d) There could be no verdict against Growers or EOP unless it was found that they, or either of them, combined or conspired with either ELP or TreeSweet or Silzle and did one or more of the six acts in pursuance of such combination or conspiracy. [R. 3711-3712.]

The trial court's theory of the case was climaxed by its refusal of petitioners' requests to instruct that the Sunkist cooperative organization, *i.e.*, Growers, EOP, and ELP, constituted a single cooperative organization and, therefore, could not conspire with itself. [R. 182-183, 3253-3255.]

As the jury's verdict was general [R. 295] it cannot be determined whether it found conspiracy or combination with TreeSweet or Silzle, or only between or among Growers, EOP and ELP. Nor can it be determined upon which of the "six acts" the verdict was based. In that state of the record the verdict cannot be up-

held unless all theories submitted were free from material error.[14]

The Court of Appeals failed to find error in the theory of liability submitted to the jury. [R. 3975-3984.] It apparently agreed that under the charge "the jury could have found that the conspiracy consisted of only Sunkist [Growers] or EOP or ELP . . ." [R. 3982-3983.] In the Court's view, however, that theory of the case did not have the effect of denying to petitioners any exemption created by Capper-Volstead for the benefit of agricultural cooperatives; for to hold that it did, the Court declared, presupposes that "agricultural cooperatives can combine to fix prices or eliminate competitors with immunity . . ." [R. 3982.] Support for the theory of the submission was found by the Court of Appeals in *United States v. Timken Roller Bearing Co.*, N. D. Ohio, 83 F. Supp. 284, *af-*

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[14]Under all the instructions given, the verdict might have been based on a finding of conspiracy or combination among only the three Sunkist cooperatives, or, upon one or more of the several other theories submitted. When two or more theories or issues are submitted to a jury and "upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given." [*Maryland v. Baldwin*, 112 U. S. 490, 493. Accord: *Wilmington Mining Co. v. Fulton*, 205 U. S. 60, 78-79; *Samuel v. United States*, 9 Cir. 169 F. 2d 787, 794-796; *Stokes v. United States*, 8 Cir., 264 Fed. 18, 23; *Baltimore & O.R. Co. v. Reeves*, 6 Cir., 10 F. 2d 329, 330-331; *North Amer. G. Corp. v. Allan*, D.C.Cir., 184 F. 2d 387, 389; *Atlantic Coast Line R. Co. v. Tiller*, 4 Cir., 142 F. 2d 718, 722; *Travelers Ins. Co. v. Wilkes*, 5 Cir., 76 F. 2d 701, 705.]

*firmed* 341 U. S. 593 [R. 3983]—a case in which it was held that it was no defense to the restraint complained of that it arose from, and was incident to, a joint venture or partnership between the parties. [See, 83 F. Supp. at 312.]

This disposition of the question does not go to the heart of the matter, for it ignores the essential fact that what Capper-Volstead immunized was collective action by farmers to process and market their products. It ignores as well the fact that restraint without unlawful concert of action is not a violation of section 1 of the Sherman Act. So the real question is not whether there was collective action; the very conception of agricultural cooperatives subsumes that there will be. The decisive question, rather, is whether the collective action involved in the doing of any one of the "six acts" was limited to the confines of the Sunkist cooperative organization set up by the growers as their processing and marketing instrumentality; for if it was so confined it was privileged and, therefore, not a prohibited form of collective activity. To hold that the members of an agricultural cooperative or their constituted processing and marketing instrumentalities may, with immunity from the antitrust laws, agree among themselves in respect of the processing and marketing of the members' products, is not to hold that they may, with similar immunity, conspire or combine with others to restrain trade. The dividing line that puts agreement within the cooperative and agreement with others in different areas is precisely the line that Congress by Capper-Volstead intended to draw.

## ARGUMENT.

### I.

### The Capper-Volstead Exemption From the Antitrust Laws of the Collective Processing and Marketing of Farmers' Products by Their Agricultural Cooperatives Is as Applicable When the Farmers Are Formally Organized Into Several Cooperative Entities as It Is When There Is Only One Such Entity.

It is evident from the language and history of the Capper-Volstead Act that it was designed to take collective action by farmers in the processing and marketing of their products out of the shadow of antitrust penalties. The Act was not needed to permit farmers to do that which without it and notwithstanding the antitrust laws they could always have done. It is, therefore, an act which, in this Court's characterization, "sanctioned cooperative action by farmers [and] restricted their amenability to the anti-trust laws . . ." [*Tigner v. Texas*, 310 U. S. 141, 145]; one which bespeaks the congressional intent ". . . to permit cooperatives," to a certain and limited extent, "to interfere with the competitive system of business . . ." [*Associated Press v. United States*, 326 U. S. 1, 14.]

Throughout the two legislative sessions at which the Act was considered the Congress was repeatedly told that the individual farmer lacked the bargaining power to get a decent price from the many and economically powerful middlemen who stood between him and the

ultimate market for his products.[15] The remedy, therefore, was cooperative action that would equalize bargaining and economic power. But, the Congress was also told that standing in the way of acceptance by farmers of that approach to their problem was the fear that collective action would result in imposition of the criminal and civil sanctions of the antitrust laws. Congress gave obvious heed to these expositions.[16] It was to allay that fear and to clear the road to cooperative action that Capper-Volstead became law.

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[15]Typical of the statements made are these by the co-authors of the legislation:

*Senator Capper:* [62 Cong. Rec. 2058, 2059]

". . . if farmers must continue to sell individually . . . then farmers must for all time remain at the mercy of the buyers. In so doing they are not in the most accurate sense marketing their products at all, but are forced by conditions to turn over such marketing to powerful associations of middlemen.

* * *

"At present there is no recourse. The farmer is in a large measure helpless. He knows that as an individual he is handicapped, and due to the ambiguity of Federal laws he fears he will lay himself open to prosecution by interests opposing him if he seeks to act collectively through cooperative organizations . . ."

* * *

*Congressman Volstead:* [61 Cong. Rec. 1033]

"It [the bill] aims to authorize cooperative associations among farmers for the purpose of marketing their products. There are a great many of those associations today scattered all over this country . . . they have been constantly threatened with prosecution . . ."

Similar statements by others will be found at 61 Cong. Rec. 1035 and 1038 (Reavis), 1042 (Summers); and 62 Cong. Rec. 2049 (Kellogg), 2122 and 2163 (Walsh), 2257 (Norris), 2261 (Hitchcock).

See, also, *April v. National Cranberry Assn.*, D.C. Mass., 168 F. Supp. 919, 921.

[16]The report of the House Committee on the Judiciary, to which the bill had been referred, commented in this way: [*House Rep. No. 24*, 67th Cong., 1st Sess., pp. 2-3.]

". . . Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast ag-

No one would doubt the applicability of Capper-Volstead to a group of farmers organized into one cooperative corporation to which was given the whole function of processing and marketing their products. No doubt of that applicability would be created if the corporation, without concert of action with outsiders, processed the products in such plant or plants as it chose, set the price at which it would sell the products, and selected its customers as an ordinary business corporation would. In all this there would be nothing but normal processing and marketing; and the fact that it was the resultant of combination or cooperation on the part of a number, even a large number, of farmers would not, in view of Capper-Volstead, make applica-

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gregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.

* * *

". . . To maintain his self-respect and the dignity of his occupation the farmer must be given an opportunity to deal in selling his products on an equal footing with those who purchase it . . ."

The report of the Senate Committee on the Judiciary [*Sen. Rep. No. 236*, 67th Cong., 1st Sess.] did not deal at length with this phase of the subject. It was concerned almost entirely with the Senate Committee's proposed substitute for the House version of section 2 of the bill. That substitute would have expressly made cooperatives subject to the monopolization provisions of section 2 of the Sherman Act. [61 Cong. Rec. 4332.] In the previous session the Senate approved but the House rejected a similar substitute. [62 Cong. Rec. 2122.] This time, however, the Senate too rejected the proposed substitute and the House version was enacted into law. [62 Cong. Rec. 2453-2455.]

ble those provisions of the Sherman Act that are conditioned on collective action. [See, *Maryland & Virginia Prod. Asso. v. United States*, 362 U. S. 458, 466-467; *United States v. Borden Co.*, 308 U. S. 188, 204-205.]

In realistic appraisal the case at bar is not distinguishable from the one just supposed. The only difference is a formal one; *i.e.*, instead of forming into one corporate instrumentality which performs the whole function of processing and marketing, the cooperating farmers here are organized into three such instrumentalities among whom the processing and marketing functions are divided. The element of combination—the element made privileged by Capper-Volstead—is the same notwithstanding that difference of form. It is still the underlying farmers who are combining; it is only their products that are being processed and marketed; it is only their instrumentalities, controlled and managed by them, that are doing the processing and marketing.

In the case at bar, it was necessary to the imposition of liability grounded in combination or conspiracy that some element of unprivileged collective action on petitioners' part be found. The courts below permitted it to be found from the mere fact of intra-coooperative activity; *i.e.*, from agreement between the cooperative instrumentalities of the underlying grower-members; and the doing, in pursuance of that agreement, of one or more acts of ordinary processing and marketing of the products of those grower-members. [See, pp. 17-18, *supra*.] It was in this respect that the courts below erred. It is to the demonstration of that error that we now turn.

*First:* We start with the language of the Act. It permits persons—farmers and fruit growers among others—engaged in the production of agricultural products, "to act together in associations, corporate or otherwise . . ." [7 U.S.C.A., sec. 291.] The use of the plural number is significant, especially when it is remembered that the Act goes on immediately to provide that "Such associations may have marketing agencies in common . . ." [*Ibid.*] The statutory inference is thus plain that Congress had in contemplation the likelihood that the cooperative organization of a single group of farmers or growers might take the form of a plurality of entities which would act together through a common marketing agency.[17]

Congress did not leave the organizational form of cooperatives entirely unmentioned or unnoticed. It placed limitations upon the voting power of the cooperative's stock and upon the amount of dividends it could pay. The cooperative had to comply with one or the other of these limitations. The Act also limited all cooperatives in respect of the extent to which they could

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[17]Congress was aware, when the Act was adopted, that there were already in existence farmer's cooperatives operating in multi-corporate form. Indeed the Sunkist organization, under its then name of California Fruit Growers Exchange, was referred to on the floor as an example. [62 Cong. Rec. 2277 (Walsh). See, also, 61 Cong. Rec. 1036 (Black).] There was no expression on anyone's part of an intention or desire to exclude such cooperatives from the benefits of the Act. There was, in fact, strong evidence of an intention to include them, as appears from the following comment in the committee report on the bill: [*House Rep. No. 24,* 67th Cong., 1st Sess., pp. 1-2]

". . . The aim has been to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves of the provisions of this bill. The bill does not, however, compel any association to change its present organization . . ."

handle the products of non-members. [7 U.S.C.A., sec. 291.] It is, therefore, fair to assume that had it been the intention to limit the corporate form to a single entity "Congress doubtless would have said so." [*United States v. Borden Co., supra*, 308 U. S. at 201. See, note 17, p. 25, *supra*, in which there is a quotation from the committee report on the bill. That quotation was the conclusion of the committee's discussion of these organizational requirements.] In the words of the Attorney General, rendering an opinion that a cooperative association is within Capper-Volstead though composed of local associations to which the farmers belong, the ". . . statute imposes no restriction upon business forms of cooperation and association which may be employed to effectively organize cooperative associations of agricultural producers for handling and marketing their products . . ." [36 Op. Atty. Gen. 326, 339.]

*Second:* We need not, however, depend upon or even argue about the literal meaning of the statutory language. It is frequently true that a statute imports a policy going beyond its words. [See, *Gooch v. Oregon Short Line R. Co.*, 258 U. S. 22, 24; *Van Beech v. Sabine Towing Co.*, 300 U. S. 342, 351. Also, Holmes, J., diss. in *Olmstead v. United States*, 277 U. S. 438, 469.] Capper-Volstead is such a statute.

So far as the words of the Act are concerned, farmers are permitted, notwithstanding the antitrust laws, to act together in associations for the purpose of processing and marketing their products. That, however, is only the means to an end. The end in view is not merely cooperation for cooperation's sake; it is to enable farmers, without deterrence from the antitrust

laws, to take advantage, for their mutual benefit, of the strengthening of bargaining power that comes from collective action. That end could not be achieved so long as the threat of antitrust prosecution stood as an obstacle in the way of utilization and development of the cooperative principle.

Of course, this does not mean that the farmer was given complete freedom to combine or conspire as he saw fit. Combination was limited to those with whom he had a community of economic interest. [*Maryland & Virginia Prod. Asso. v. United States, supra*, 362 U. S. at 466-467, 472; *United States v. Borden Co., supra*, 308 U. S. at 204-205. See, Hanna, *Antitrust Immunities of Cooperative Associations*, 13 Law and Contemp. Problems, 488.] To make sure that the resulting cooperative association would be operated only for the mutual and even-handed benefit of its members, limitations were imposed upon the corporate voting power and the share of proceeds that could be vested in any one member. Subject to these limitations, it is clear that Congress was not concerned with the form of cooperation but with the achievement of it in fact.

The policy thus imported by the Act should not be constricted by formal considerations. The end result of cooperation by farmers is the same whether any particular group of them achieves it in the form of only one or of several corporate entities. The important element is that the cooperation, however it is outwardly evidenced, be and remain only the cooperation of the farmers themselves.

The antitrust laws are practical statutes. Their restrictions "are not mechanical or artificial . . . [C]lose and objective scrutiny of particular conditions

and purposes is necessary in each case. Realities must dominate the judgment . . ." [*Appalachian Coals v. United States*, 288 U. S. 344, 360.] Accordingly, in the cited case, a combination in the form of collective designation of a common marketing agent for a number of concerns in the same line of trade, which, of course, tended to eliminate competition between those joining in the designation, was held not to be violative of the Sherman Act because, realistically viewed, the same adverse effect upon competition could have been lawfully produced by a different form of combination (merger) from the one actually employed."[*] [288 U. S. at 375-377.]

The case at bar is analogous in principle, as we have shown. [See, pp. 23-24, *supra*.] Even in the case of ordinary business corporations it is held that the concert of action required under section 1 of the Sherman Act is not supplied by the concerted action of the officers and agents of one corporation [*Nelson Radio & Supply Co. v. Motorola*, 5 Cir., 200 F. 2d 911, 914, *cert. den.* 345 U. S. 925]; or by cooperation between departments or divisions of one corporate entity. [See, *Locher v.*

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[*] It may be that today, and since the 1950 amendment [Act of Dec. 29, 1950, 64 Stat. c. 1184] that broadened and made clear the scope of section 7 of the Clayton Act [15 U.S.C.A., sec. 18]—see, *United States v. DuPont De Nemours & Co.*, 353 U. S. 586, 590—the Court's premise of the legality of such a merger might be found unsound as against determined challenge under that section. But the Court's reasoning from that premise was and still is sound. It is for that reasoning that we cite the case. The equivalent premise in the case at bar is unquestionably sound. It is that farmers may combine into a single-entity agricultural cooperative and that, insofar as those provisions of the antitrust laws that are conditioned upon collective action are concerned, it is lawful for that cooperative to process and market its members' products and, to that end, select its processors, fix its own prices and exercise a single trader's usual discretion in determining to whom it will or will not sell.

*American Tobacco Co.*, 2 Cir., 218 Fed. 447, 449; *Smith v. Onyx Oil & Chem. Co.*, 3 Cir., 218 F. 2d 104, 109.] Here, the three cooperative entities were doing exactly, and no more than, that which would have been done had there been only one Sunkist corporation divided administratively into orange-processing, lemon-processing and marketing departments. Had that been the form of corporate structure involved here, the applicability of Capper-Volstead would be undeniable. If "realities are to dominate the judgment" no substantive legal difference can be derived from a purely formal difference of corporate structure.

There is another suggestive analogy in the interpretative history of the antitrust laws. The legislative intention behind the labor exemption in the Clayton Act [15 U.S.C.A., sec. 15], many people thought, had been frustrated by unnecessarily narrow construction. [See, *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797, 801-805.] Congress, therefore, enacted the Norris-LaGuardia Act. [29 U.S.C.A., chap. 6.] That statute, in words, dealt primarily with the use of injunctions in labor disputes; but its policy was significantly broader, *i.e.*, to undo what had been done to the Clayton labor-exemption by judicial construction. As a consequence, the new legislation was held to effect not merely an immunity from injunctive process, but more broadly, an exemption from the antitrust laws for the collective activities of labor unions and their members, so long as those activities were carried on in the mutual self-interest of the members, without combination with others. [*United States v. Hutcheson*, 312 U. S. 219; *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U. S. 365, 369.]

The purpose behind freeing agricultural cooperatives from the full reach of the antitrust laws is very similar to the purpose behind the exemption of labor. In each instance it is to permit collective bargaining for economic advantage from the bargaining strength that comes from cooperation; and to enable that type of bargaining to be carried on through appropriate associations without the deterrence to organization that would otherwise be exercised by those laws. In the case of the labor exemption this Court said that "it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed . . ." [*Apex Hosiery Co. v. Leader*, 310 U. S. 469, 489.] It is equally appropriate that the agricultural exemption of Capper-Volstead be given the same treatment.

*Third:* The Court of Appeals was apparently of the view that the instant case was controlled by the so-called doctrine of intra-enterprise conspiracy. [See, pp. 19-20, *supra*.] Dependence upon that doctrine, we respectfully suggest, was error. Even if it be assumed that because of the doctrine any concert of action or agreement between affiliated corporations having a trade-restraining effect is unlawful, it does not follow that the doctrine is applicable to a case in which the intra-enterprise concert of action is privileged. It is not restraint alone but restraint produced by unlawful concert that section 1 of the Sherman Act proscribes. [*Union Pacific Coal Co. v. United States*, 8 Cir., 173 Fed. 737, 739; *Weir v. Chicago Plastering Institute*, 7 Cir., 272 F. 2d 883, 887; *Nelson Radio & Supply Co. v. Motorola, supra*, 200 F. 2d at 914. And *cf.*,

*Federal Trade Com. v. Raymond Bros.-Clark Co.*, 263 U. S. 565, 573-574.] The whole significance of Capper-Volstead is that concert of action among, but confined to, farmers in the processing and marketing of their products is privileged so far as the antitrust laws are concerned.

In point of fact, this Court has never employed the doctrine as an affirmative means of imposing liability in a situation where, without the doctrine, there would be no liability. The doctrine has come into play only to reject, in a case involving an otherwise established liability, a defense based on affiliation between the corporate conspirators. [See, *United States v. Columbia Steel Co.*, 334 U. S. 495, 522.] That is well illustrated by *Kiefer-Stewart v. Jos. E. Seagram & Sons*, 340 U. S. 211—the case which the Court of Appeals cited. There the violation charged and proved was a conspiracy to fix and maintain the resale price of a commodity manufactured and distributed by the corporate defendants who were parent and subsidiary. To that conspiracy the parent and subsidiary corporations were not the only parties. Adherent to it also were the independent dealers who resold the commodity involved. That was clearly a violative conspiracy or combination, without regard to the corporate affiliation of the manufacturers. [See, *e.g.*, *Federal Trade Com. v. Beech-Nut Packing Co.*, 257 U. S. 441; *United States v. Parke, Davis & Co.*, 362 U. S. 29.] So far as "intra-enterprise conspiracy" was concerned, all that this Court did was to say that it is no defense to a conspiracy of the kind there shown that the two manufacturing companies are parent and subsidiary, especially when the two com-

panies "hold themselves out as competitors."[19] [340 U. S. at 215.]

When the affiliated companies are agricultural cooperatives, composed of, and controlled and operated by, the same group of grower-members, the case is measurably different. When that is the situation and the only element of concert of action is concert within the confines of the cooperative organization itself, there is no violation of section 1, for the concert of action is privileged. The defense in such a case is not merely the fact that there is affiliation, but that the affiliation and the intra-cooperative action produced by it have been taken out of the reach of the antitrust laws.[20]

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[19]Another intra-enterprise conspiracy case is *Timken-Roller Bearing Co. v. United States*, 341 U. S. 593. This Court's discussion of the subject in that case was obviously in response to a government contention which, when compared with the quotation from *Kiefer-Stewart* in the footnoted text immediately above, takes on an enlightening significance. The government's contention, citing *Kiefer-Stewart* among others, was this: [*Brief for the United States*, (Oct. Term 1950, No. 352) pp. 92-93]

> "There is no magic in the relationship between a stockholder and a corporation which will support an agreement between them not to compete. Even where stock ownership is sufficient to constitute voting control agreements not to compete are not thereby legalized. It has repeatedly been held that common ownership, financial integration, parent-subsidiary relationship, is not a defense to agreements not to compete between affiliated corporations if they are in fact *separate companies;* and the decisive fact here is that *these co-conspirators were separate companies, separately operated.* . . ." (Italics added.)

[20]The other intra-enterprise conspiracy cases from this Court are distinguishable for pretty much the same reasons as is *Kiefer-Stewart*. In two of them—*United States v. Crescent Amuse. Co.*, 323 U. S. 173, and *Schine Chain Theatres v. United States*, 334 U. S. 110—the violation was monopolization, for which no plurality of actors is needed. Furthermore, the conspiracy, to the extent that it was involved, was not confined to the affiliated corporate organization, for, in *Crescent* some of the conspiring companies were owned and controlled by a different group from that which controlled the other corporate conspirators; and in

## II.

## The Disposition of This Case by the Lower Courts Erroneously Denied to Petitioners the Benefits to Which Agricultural Cooperatives Are Entitled Under the Capper-Volstead Act.

The jury in this case were instructed that conspiracy to restrain or monopolize interstate trade is an offense; and that the conspiracy necessary to make out that offense could be found in action or agreement to which only the Sunkist cooperatives were parties.[21] [See,

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*Schine*, as in *Kiefer-Stewart*, the conspiracy included outsiders. That was also true of *United States v. Yellow Cab Co.*, 332 U. S. 218, in which at least one of the corporate conspirators (Checker) was not owned by the same person who owned the others. It was anyway a monopolization case; and, as this Court has explained, what was there said was that "the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act . . . ." [*United States v. Columbia Steel Co., supra*, 334 U. S. at 522.] Furthermore, there the affiliation was itself the violative combination because it was the product of a plan of "deliberate, calculated purchase for control" of the relevant market. [See, 332 U. S. at 227-228.] This last comment is also applicable to *Timken Roller Bearing Co. v. United States, supra*, 341 U. S. 593, in which the affiliation was similarly the product of a deliberate plan by which separate and competing companies were brought together under common control to divide markets and restrict competition.

Generally, see, *Report of the Attorney General's National Committee To Study The Antitrust Laws* (Govt. Print. Off. 1955), pp. 30-36.

[21]We need not be concerned with the question whether there might have been support for the jury's verdict in some theory of monopolization, or of conspiracy with outsiders not members of Sunkist. The verdict was general. The record does not show that the verdict was based on either of these other theories or that it was not based on the alternative theory of intra-cooperative action. For the purpose, therefore, of testing the soundness of the alternative theory we must assume that it was the one upon which the jury acted or by which it was influenced in reaching its verdict. [Cases cited, note 14, p. 19, *supra*.] Furthermore, it is only the soundness of that theory that is within the scope of the limited grant of certiorari.

The jury were told that there was no claim in the case of any attempt to monopolize. [R. 3703.]

pp. 17-18, *supra.*] That submission worked in two ways to deprive petitioners of the Capper-Volstead benefits to which they were entitled.

*First:* Agreement within the cooperative organization was made unlawful, notwithstanding it did not go beyond allocation within it of the functions of processing and marketing. We put on one side, as we must for the purpose of testing the intra-cooperative theory of liability, whatever evidence there may have been of combination or agreement with outsiders. What remains is only evidence of the arrangements by which processing functions were assigned to EOP and ELP and marketing to Growers. [See, pp. 8-10, *supra.*] As we have shown, these were no different in substance from a similar division of functions between departments of a one-entity cooperative. [See, pp. 23-24, 28-29, *supra.*] If the latter is entitled to the immunity conferred by Capper-Volstead, as no one denies, so is the former.

*Second:* Activities that were nothing but ordinary processing and marketing of the fruit of the Sunkist grower-members, were permitted to be made the basis of a finding of illegality. Any one of the "six acts" if done pursuant to agreement or "conspiracy" between Growers and EOP or ELP was enough, under the court's charge, for a verdict of antitrust violation against petitioners. Yet, none of these acts, had they been performed by a one-entity cooperative, would have been violative of the antitrust laws.[22]

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[22]None of the six acts was of a trade-restraining character in itself. Their intrinsic quality does not change merely because done pursuant to privileged agreement. In any event, since we cannot tell from the record which of them influenced the verdict, it is enough to infect the charge to the jury with error that any one of them was of a character that would not support a finding of trade restraint. [Cases cited, note 14, p. 19, *supra.*]

For example, Capper-Volstead certainly permits an agricultural cooperative to process its members' products. The Act is explicit to that point. Nothing in the Act suggests that the permitted processing can not be effected lawfully by hiring some one else's facilities for that purpose. But, at bar the jury were told that if ELP processed oranges for EOP, or the latter processed lemons for the former, pursuant to agreement with each other or with Growers, liability was made out. In that way, the purely ordinary processing that Capper-Volstead expressly permits was denied the petitioners. The fruit in each instance was fruit of the Sunkist members. It was, therefore, fruit they were entitled to have processed as the result of their collective agreement to cooperate in the processing and marketing of their products. The quality of that agreement is not changed because it was not made immediately by the members but mediately by their selected processing representatives or instrumentalities.

So, too, the Sunkist grower-members were entitled under Capper-Volstead to market their fruit collectively or through a marketing agency common to all of them. The Act is also explicit in this regard. From this it necessarily follows that the members, acting directly by their own agreement or indirectly by the decision of their marketing agency, may fix the prices at which their products will be sold. This court has recognized as much. [See, *Maryland & Virginia Prod. Asso., supra*, 362 U. S. at 466.] In the case at bar, that simple and necessary step in the marketing process was made the badge of a violation of the antitrust laws. [See, pp. 10, 15-16, *supra*.]

It is also a necessary consequence of Capper-Volstead's exemption of collective marketing, as well as

of its express language, that cooperative "associations and their members may make the necessary contracts and agreements" to effect the purposes of processing and marketing. [7 U.S.C.A., sec. 291.] Non-restrictive contracts for processing of the members' products and for the sale of those products are obviously within this express grant. The processing-juice purchase contracts with TreeSweet and Silzle were of this kind. [See, pp. 11-13, *supra.*] They provided for nothing more than the processing of Sunkist oranges into juice; and the purchase of the resulting juice by the processor. The contracts were not trade-restraining in themselves. There was a good business reason for them; one which was obviously in furtherance of the purposes of processing and marketing for which agricultural cooperatives are permitted to be formed. [See, pp. 11-12, *supra.*]

The refusal to enter into business relations with Winckler was entirely permissible. Freedom to sell necessarily includes freedom not to sell. A single trader's refusal to deal, even in the case of an ordinary business corporation, does not violate the Sherman Act when not made pursuant to a proscribed concert of action or from a purpose to achieve or maintain a monopoly.[22] [*United States v. Colgate Co.*, 250 U. S. 300, 307; *Times-Picayune Pub. Co. v. United States*, 345 U. S. 625; *Federal Trade Com. v. Raymond Bros-Clark Co.*, *supra*, 263 U. S. at 573.] *A fortiori* must that be so when the concern refusing to deal is one that, in respect of marketing not carried on by agreement or conspiracy with outsiders, is not amenable to the antitrust laws.

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[22] Any question arising from alleged monopolization is not here involved. [See, note 21, *supra.*]

There is a sharp contrast between the facts of the instant case and those that were held determinative of antitrust violation in *Borden, supra,* 308 U. S. 188, and *Maryland & Virginia, supra,* 362 U. S. 458. First, in the case at bar, whatever concert of action or combination there might have been was entirely intra-cooperative in nature; in the earlier cases the combination extended to and embraced persons and concerns not members or processing or marketing instrumentalities of the agricultural cooperative. Second, at bar, the "six acts" were nothing but ordinary steps in the course of processing and marketing the grower-members' products; in the other cases the acts taken in pursuance of the unprivileged combination there involved were plainly predatory and anti-competitive in kind.[24]

## Conclusion.

The judgment of the Court of Appeals, insofar as it affirmed the judgment of the District Court on the issue of liability, should be reversed.

Respectfully submitted,

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[24]For example, in *Maryland & Virginia* there were such acts as the acquisition by the cooperative of its strongest competitor for the purpose of eliminating competition; the agreement with that competitor that the latter would endeavor to cause its members or producers either to join the cooperative or transfer their competitive activity to another market; and, group boycotts of those who would not buy from the cooperative. [362 U. S. at 468-470]; in *Borden* the burden of the indictment was group fixing of the price that the cooperative and all other distributors of milk would pay to producers of the milk and of the resale prices of milk sold by the distributors. [308 U. S. at 194, incorporating the District Court's construction of the indictment at 28 F. Supp. 179-181, by which the Supreme Court was bound.]

# APPENDIX.

## Statutes Involved.

SHERMAN AND CLAYTON ACTS [15 U. S. C. A., Secs. 1, 2, 17]

§1. Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . [July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.]

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. . . . [July 2, 1890, c. 647, §2, 26 Stat. 209.]

§6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. [Oct. 15, 1914, c. 323, §6, 38 Stat. 731.]

CAPPER-VOLSTEAD ACT [7 U.S.C.A. Sec. 291, 292]

§1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First: That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or

Second: That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third: That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. [Feb. 18, 1922, c. 57, §1, 42 Stat. 388.]